The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: University of South Carolina

File: B-240208

Date: September 21, 1990

Clifford Scott, Esq., and F. John Vernberg, Ph.D., for the protester.
Howard A. Raik for CHP International, Inc., an interested party.
Kirby Mullen, Esq., and Joseph F. Radford, U.S. Peace Corps, for the agency.
Catherine M. Evans and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where offeror selected for award substituted key personnel in proposal prior to award, and agency reviewed and approved the substitutions; substitutions constituted discussions with proposed awardee and the agency therefore was required to conduct discussions with the other offeror in competitive range.

DECISION

The University of South Carolina (USC) protests the award of a contract to CHP International, Inc. under request for proposals (RFP) No. PC 90-8, issued by the United States Peace Corps for a fish culture training program. USC primarily alleges that the agency improperly allowed CHP to substitute key personnel in its proposal prior to award, in effect allowing CHP to revise its proposal without allowing USC to do the same.

We sustain the protest.

In November 1989, the Peace Corps awarded CHP a sole-source contract for fish culture training in Liberia. While this training was in progress, the unstable political situation in Liberia forced the Peace Corps to evacuate its Liberia-stationed volunteers and trainees to the United States. In order to continue the fish culture training, the Peace Corps prepared a Determination and Findings justifying procurement on a limited competition basis, and issued the RFP for

stateside training to three potential offerors on May 8, 1990.

The RFP required offerors to submit technical and cost proposals, and provided for the possibility of award based on initial proposals. With regard to technical proposals, the RFP allocated 35 of 100 available points to personnel, including 15 points for the master trainer position and 10 points for the remaining 5 to 6 technical trainer positions. The solicitation also contained a provision requiring contracting officer approval of any personnel substitutions subsequent to the original proposal.

Two offerors, USC and CHP, responded to the solicitation by the May 29 closing date. A four-member technical evaluation panel reviewed both proposals and requested minor clarifications from each offeror. The panel found both proposals technically acceptable, awarding 85.75 points to CHP and 79.5 points to USC, and on June 7 recommended award to CHP. As CHP's high-scoring proposal also offered the lowest price by approximately 20 percent, the contracting officer requested that the agency's source selection authority (SSA) approve award to CHP on the basis of initial proposals. On June 8, before the SSA approved the award, CHP informed the contracting officer that two of its proposed employees, the master trainer and a technical trainer, were no longer available. CHP proposed to fill the master trainer position with an individual who had been listed in the proposal as a technical trainer, and stated that the two technical trainer vacancies would be filled by "qualified" individuals. On June 11, CHP submitted resumes for the two substitute technical trainers, which were forwarded to the technical panel and subsequently approved. On June 12, the SSA approved the award to CHP and award was made on that date. This protest followed on June 26. On June 27, the Peace Corps determined, in accordance with 31 U.S.C. § 3553(c)(2)(A) (1988), that urgent and compelling circumstances significantly affecting the interests of the United States did not permit suspension of contract performance pending a decision on the protest by our Office, and contract performance is continuing.

USC first alleges that the Peace Corps was biased in favor of CHP, as evidenced by, among other things, CHP's advance knowledge that contract award was imminent because a member of the evaluation panel was due to leave the country. As government officials are presumed to act in good faith, to establish bias a protester must present convincing evidence that government officials had a specific and malicious

intent to injure the protester. Microlog Corp., B-237486, Feb. 26, 1990, 90-1 CPD ¶ 227, aff'd, B-237486.2, May 17, 1990, 90-1 CPD ¶ 482. There is no convincing evidence that procuring officials were biased. CHP explains that it was aware of the evaluation panel member's travel plans only because that person is the contracting officer's technical representative for two other CHP contracts with the Peace Corps. The mere indication to CHP that award soon would be made in no way establishes bias or other improper motives by the agency in making its award determination.

USC also contends that the Peace Corps failed to provide it equal treatment by conducting discussions with CHP and not with USC. USC argues that since CHP's substitution of personnel was approved by the agency, it amounted to discussions; thus, USC maintains, discussions were required to be held with USC, the other offeror. The Peace Corps responds that because CHP's proposal had already been determined to be acceptable, the acceptance of a staff change did not constitute discussions. In this regard, the agency notes that CHP's new proposed master trainer was already listed in CHP's proposal as a technical trainer, and that his qualifications were suitable for either position. The agency further submits that the technical trainer position is not a key position and that the technical trainer substitutions therefore did not require approval. The thrust of the Peace Corps' argument seems to be that CHP did not materially change its proposal. We agree with USC.

Discussions occur when an offeror is given an opportunity to revise or modify its proposal, or when information provided by an offeror is essential for determining the acceptability of its proposal. Federal Acquisition Regulation (FAR) § 15.601; Motorola, Inc., B-225822, June 17, 1987, 87-1 CPD ¶ 604. This is true regardless of whether the opportunity to revise or modify resulted from actions initiated by the government or the offeror. PRC Information Sciences Co., 56 Comp. Gen. 768 (1977), 77-2 CPD ¶ 11. Discussions are to be distinguished from a request for clarifications, which is merely an inquiry for the purpose of eliminating minor uncertainties or irregularities in a proposal. FAR § 15.601; Motorola, Inc., B-225822, supra. The conduct of discussions with one offeror generally requires that discussions be conducted with all offerors whose offers are within the competitive range and that the offerors have the opportunity to submit revised offers. Motorola, Inc., B-225822, supra. This rule applies even to post-selection negotiations that do not directly affect the offerors' relative standing, because all offerors are entitled to an equal opportunity to revise their proposals. PRC Information Sciences Co., 56 Comp. Gen. 768, supra.

CHP's substitution of personnel and the Peace Corps' consideration and acceptance thereof constituted discussions. The acceptability of CHP's proposal depended upon whether the proposed substitutes were approved as meeting the RFP requirements. Although CHP's replacement master trainer was already listed in the proposal as a technical trainer, he had not been evaluated as master trainer, a much more important position in terms of both qualifications and evaluation points. The replacement technical trainers, while less important in the evaluation scheme, also required approval under the terms of the RFP. Therefore, because the information submitted by CHP concerning the substitute personnel was essential to the agency's determination of the acceptability of its proposal, the agency conducted discussions with CHP and therefore was required to conduct discussions with the protester. See Corporate Am. Research Assocs., Inc., B-228579, Feb. 17, 1988, 88-1 CPD ¶ 160.

Our conclusion is not changed by the agency's contention that USC was not prejudiced because CHP's substitution of equally qualified personnel did not affect CHP's position of technical superiority. We note that while the contracting officer's June 8 request for SSA approval of the award to CHP was pending, the contracting officer was still awaiting resumes of CHP's replacement staff, and that while these personnel were ultimately approved by the technical panel, they did not receive technical scores as did the originally proposed staff. In view of the closeness in the offerors' scores, it is not clear that the outcome of the competition would have been the same if CHP's technical score had been based upon its replacement personnel and USC had been provided a similar opportunity to revise its proposal. See Microlog Corp., B-237486, supra.

The appropriate remedy where an agency improperly conducts discussions with only one offeror would ordinarily be for the agency to hold meaningful discussions with all offerors in the competitive range and request best and final offers. However, because CHP is currently performing and is approximately halfway through the training cycle, it would be impracticable to terminate the contract. Under the circumstances, we find that the protester is entitled to recover its costs of proposal preparation and the costs of

filing and pursuing the protest. 4 C.F.R. § 21.6(d) (1990); see Eklund Infrared, B-238021, Mar. 23, 1990, 90-1 CPD ¶ 328. USC should submit its claim for such costs directly to the agency.

The protest is sustained.

for James F. Hinchman
Comptroller General
of the United States